IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0102

GASTON ENGINEERING & SURVEYING, P.C.,
Appellant,

v.

OAKWOOD PROPERTIES, LLC and YELLOWSTONE BANK,
Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Eighteenth Judicial District Court, Gallatin County, Montana, Honorable John C. Brown, presiding.

APPEARANCES:

Kellie G. Sironi
P.O. Box 81646
Billings, MT 59106
Telephone: (406) 860-9476
Facsimile: (406) 248-4257
kellie.sironi@gmail.com
Attorneys for Gaston Engineering

David M. Wagner
45 Discovery Drive, Ste. 200
Bozeman, MT 59715
Telephone: (406) 556-1430
Facsimile: (406) 586-1433
dwagner@crowleyfleck.com
Attorneys for Yellowstone Bank

Joseph W. Sabol, II
225 E. Mendenhall
Bozeman, MT 59715
Telephone: (406) 587-9338
Facsimile: (406) 587-9752
sabollaw@montana.net
Attorneys for Oakwood Properties

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I. STATEMENT OF THE ISSUES

1. Whether, the district court erred by denying Gaston summary judgment that under Mont. Code Ann. §71-3-542(4) its construction lien has priority over the Bank's mortgage that nonexclusively secured advances to pay for Gaston's work on the project.

2. Whether the district court erred by granting *sua sponte* summary judgment to the Bank when factual issues were in dispute.

3. Whether the district court erred by denying Gaston's Rule 59(g) Motion that asked the court to consider newly discovered evidence that is relevant to its summary judgment ruling and to modify that ruling so a trial could be held on the disputes of fact.

II. STATEMENT OF THE CASE

In January of 2008, Gaston Engineering & Surveying, P.C. ("Gaston") filed a Complaint in the 18th Judicial District, Gallatin County, against Oakwood Properties, LLC ("Oakwood") and Yellowstone Bank (the "Bank"). (Complaint, Docket No. 1).[1] Gaston sued Oakwood for breach of contract. It sought foreclosure of Gaston's construction lien that was recorded against Oakwood's land (the "Property") for Gaston's unpaid work on the Troutcreek subdivision development project (the "Project"). Gaston named the Bank to foreclose the Bank's one and only mortgage on the Property (the "Mortgage").

[1] References to pleadings filed in the district court will state the district court's docket number from its Case Register Report.

In June 2008, Gaston filed for summary judgment against both defendants. Gaston asserted a right to be paid and priority of its Construction Lien because the Mortgage secured advances the Bank made to pay (in part) for Gaston's work on the Project. (Motion for Sum. Judg., Docket No. 24). Oakwood stipulated to judgment against it on all counts, which judgment was filed on September 26, 2008. (Stip. Judg., Docket No. 45). The Bank opposed Gaston's motion, claiming its Mortgage was prior to the Construction Lien. (Bank's Response to Gaston's Motion, Docket No. 33).

The district court held a hearing on Gaston's motion on September 25, 2008. Gaston specifically reserved the right to later and separately argue whether the Bank's encumbrance is a purchase money mortgage ("PMM") and, if so, whether such a mortgage has absolute priority over construction liens. Before the court ruled on Gaston's motion, but months after discovery closed, Gaston received from a third-party documents from the Bank's file. The Bank had not produced the documents in discovery. (Motion for Sanctions, Docket No. 71). In resolution of a sanctions motion against the Bank, Gaston filed a supplemental brief in support of its summary judgment motion. (Joint Request to Resolve Sanctions and Order, Docket Nos. 94 and 95). The brief attached documents showing the Mortgage secured funds

used to pay for Gaston's construction work on the Project. (Suppl. Brief in Support of Sum. Judg., Docket No. 97).

The court scheduled trial for December 1, 2009, the Monday after Thanksgiving. The day before Thanksgiving (just days before trial) the court issued its Order Re: Summary Judgment (the "SJ Order," Docket No. 131). The SJ Order denied Gaston's motion and *sua sponte* granted summary judgment to the Bank. The basis for the court's decision was that it parsed out several advances secured by the Mortgage and held that because one of them paid for land, the Mortgage was a PMM. The court ruled a PMM has absolute priority over Gaston's Construction Lien. The court was silent on the Bank's admissions that the Mortgage secured advances for construction costs.

Because the November 2009 SJ Order resolved the factual issues Gaston preserved at the September 2008 hearing, Gaston filed a motion under Mont. R. Civ. Pro. 59(g). Gaston asked the court to amend its SJ Order by removing its findings of fact and holding trial on those disputes (the "Rule 59(g) Motion," Docket No. 154). Gaston asked the court to consider Bank documents Gaston received from a third-party just days before the SJ Order, which were relevant to the court's reasoning. (Id.) The Rule 59(g) Motion included an offer of proof. (Id.) The court denied

Gaston's motion on February 5, 2010. (Order Denying Rule 59(g) Motion, Docket No. 160). Gaston filed this appeal March 4, 2010. (Notice of Appeal, Docket No. 161).

Gaston asks this Court to reverse the denial of its Summary Judgment Motion and grant it summary judgment that the Construction Lien has priority over the Mortgage. Alternatively, Gaston asks this Court to reverse the denial of the Rule 59(g) Motion and remand for trial.

III. STATEMENT OF FACTS

In early 2006, Oakwood began due diligence work for plans to subdivide the Property into "Troutcreek," a residential subdivision near Bozeman. (Stip. Judg., Docket No. 45). The Davenport Trust owned the Property. (Bank's Reply to Suppl. Brief in Support of Sum. Jud., Exh. A, Docket No. 98). Oakwood and the Trust signed a buy-sell agreement on June 12, 2006 to buy the Property for $4.465M. (Id., line 30). The sale was contingent on Oakwood's acceptance of water monitoring and perc test results. (Id., lines 123-124). The Trust agreed to allow testing, which would involve digging around the Property, to begin immediately. (Id., lines 135-137). The Trust agreed to assume the test results and costs thereof if the deal fell through. (Id.) That same day, Gaston commenced the tests,

digging many holes and installing the monitoring wells. (SJ Order, p. 2, Docket No. 131; Stip. Judg., Docket No. 45).

Oakwood approached the Bank for financing. Before it borrowed money and the Bank recorded the Mortgage, Oakwood told Bank officer Bill Paul it needed money to develop the Project and obtain preliminary plat for the subdivision. (Aff. of K. Taylor, ¶3, Exh. C to Rule 59(g) Brief, Docket No. 155). Mr. Paul said the Bank would record one Mortgage for $6M to cover the $4.465M purchase price **and** to pay for construction expenses of the Project. (Id., ¶4).

Oakwood's president, Kelly Taylor, took notes of his conversation with Mr. Paul. (Id., ¶6). The notes show the communications began on August 15, 2006, before the Mortgage was recorded. (Id.) He recorded that the Bank promised to "partner" with Oakwood on the Project. (Id., ¶5) The Bank denies this comment.

Oakwood accepted Gaston's tests and bought the Property. (Id., ¶10). After the deed transferred the Property to Oakwood on September 20, 2006, the Bank recorded its Mortgage for $6M. (Suppl. Brief in Support of Sum. Judg., Exh. A, Docket No. 97).

The Bank's records confirm it knew the Mortgage would secure financing for construction expenses. (Id., Exh. C). These records show the

Bank would advance funds to cover "entitlement processing costs, namely engineering, surveying, etc." (Id., p. YOBank01564). According to banking standards, these records prove the Bank's original intent was to secure advances for the purpose of paying for the Project's construction expenses. (Aff. of R. Farmer, ¶¶5 &8, attached as Exh. D to Rule 59(g) Brief, Docket No. 155). The Bank took several actions to confirm its intent. It recorded a Mortgage for almost $2M more than necessary to buy the Property. (Id., ¶7) It relied on a Property appraisal that included an 'as completed' value, showing it valued the Property as a subdivision rather than simply raw ground. (Id.) It obtained a lender's title policy that used an endorsement rather than a separate title policy for additional advances under the Mortgage. (Id.)

The way the Bank drafted the Mortgage's payment provisions also demonstrates that, from the outset, it intended to pay for construction expenses. (Id., ¶¶9-11). Bank records say the Oakwood loan would be serviced in part through lots sales from another subdivision called "Creekwood." (Suppl. Brief in Support of Sum. Jud., Exh. C, p. YOBank01564, Docket No. 97). The represented value of each of the 18 Creekwood lots was $150,000. (Id.) Thus, even if 100% of the lots sold, the total would yield only $2.7M dollars of a $6M Mortgage. The Bank

anticipated a second source of repayment would cover the difference – namely the sale of the Troutcreek lots that the Bank's construction loan would be helping create. (Aff. of R. Farmer, ¶10, attached as Exh. D to Rule 59(g) Brief, Docket No. 155).

As the Project began, Oakwood sent Gaston's invoices to the Bank. The Bank received and paid them, without objection, advancing money under its Mortgage. (Suppl. Brief in Support of Sum. Jud., Exh. C, Docket No. 97). The Bank first paid about $43,000 to Gaston. (Id., pages YOBank 01107, 01120, 01421-27). The Bank paid another $92,000 for other construction work, legal help, permits, test wells, road excavation, etc. (Id., and see Brief in Support of Sum. Judg., Exhs. E & F (Prom. Note & Boarding Data Sheet), Docket No. 25). The specific purpose of these advances was to "cover costs of entitlement processing for new subdivision." (Id.) The Bank did not record a separate mortgage for the additional advances. It modified its Mortgage to include them. (Id., Exh. G (Modification of Mortgage)).

When several bills went unpaid, Gaston was forced to record a Construction Lien on the Property on October 12, 2007. (Complaint, Exh. A (Construction Lien), Docket No. 1). The Construction Lien is valid and enforceable against the Property. (SJ Order, p. 2, Docket No. 131).

IV. STANDARD OF REVIEW

This Court reviews summary judgment rulings *de novo*. Peterson v. Eichhorn, 2008 MT 250, ¶12, 344 Mont. 540, 189 P.3d 615. Because the court granted *sua sponte* summary judgment for the Bank, the record must reflect an absence of any genuine issue of material fact and the Bank's entitlement to judgment as a matter of law. (Id., ¶12). This Court looks at the evidence before the court in the "most favorable" light to Gaston, drawing "all reasonable inferences" in Gaston's favor. (Id.) Other standards applicable to this appeal are discussed below.

V. SUMMARY OF THE ARGUMENT

The court erred in denying Gaston summary judgment and granting *sua sponte* summary judgment to the Bank. The Bank only has one Mortgage and it secured, in part, payments of Gaston's work on the Project. Under Mont. Code Ann. §71-3-542(4), therefore, the Construction Lien has priority. The court's conclusion that the Mortgage has absolute priority as a PMM is in error as a matter of law. No law gives a PMM absolute priority over a construction lien. The court's decision that the Mortgage was a PMM was made by parsing out advances under the Mortgage and looking at only one of them. The Legislature has not created a "purchase money loan."

Because the Bank paid for construction work on the Project, the Mortgage cannot be a PMM. Whether the Mortgage secured just the purchase of land, payment of improvement expenses, or both, is a factual issue that prevents summary judgment for the Bank.

VI. ARGUMENT

A. Regardless of when the Construction Lien attached to the Property, it has priority over the Mortgage. Under Mont. Code Ann. §71-3-542(4) the Mortgage was used for the nonexclusive purpose of securing advances to pay for the Project for which the Construction Lien was recorded.

1. There is only one Mortgage in this case.

The Bank admits its claim to priority is based on **one** Mortgage. (Amended Answer, ¶2, Docket No. 16 and Brief in Support of Sum. Jud., Exh. D, Docket No. 25). It did not execute separate mortgages for each advance made to Oakwood. (Exh. G to Docket No. 25).

2. The Bank admits its Mortgage was executed for the "nonexclusive purpose of securing advances for the construction" of the Project.

In the Bank's words, "it is undisputed" that its Mortgage secured advances to Oakwood. (Response to Gaston's Notice of Recent S. Ct. Opinion, p. 6, Docket No. 120). The Bank "does not dispute" that money advanced under the Mortgage "was a construction loan made to cover

expenses including those for services provided by Gaston." (Response to Sum. Jud. Motion, p. 6, Docket No. 33; and see Bank's Reply to Suppl. Brief in Support of Sum. Judg., p.5, Docket No. 98). The court acknowledged the Mortgage secured a loan to "cover costs of entitlement processing for new subdivision. (Order Denying R. 59(g) Motion, p. 2, Docket No. 160). When it originally loaned money to Oakwood, the Bank agreed to advance "financing for some of the entitlements processing costs, namely engineering, surveying, etc." (Suppl. Brief in Support of Sum. Jud., Exh. C, p. YOBank01564, Docket No. 97).

And, that is just what it did. The Bank "advanced [money under the Mortgage] to pay the invoice to Gaston" for the purpose of "reimbursement of invoices paid to date on the [Troutcreek] subdivision project." (Id., YOBank01563) It also used the Mortgage to secure advances to pay for legal expenses, taxes, construction materials, permits, printing plans, road sections, test well materials, and excavating 19 test wells. (Id., YOBank01426).

3. Under this Court's holding in Signal, the district court erred by ignoring the plain language of Section 71-3-542(4), MCA, parsing up the Mortgage by the advances it secured, and determining the Mortgage's priority based on one advance.

The undisputed facts show the Mortgage's "nonexclusive purpose [was] securing advances for the construction" project for which Gaston filed its Construction Lien. The Construction Lien, therefore, has priority.

> A construction lien has priority over **any interest, lien, mortgage, or encumbrance** that is filed before the construction lien attaches if that interest, lien, mortgage, or encumbrance was taken to **secure advances made for the purpose of paying for the particular real estate improvement to which the lien was attached**.

Mont. Code Ann. §71-3-542(4) (emphasis added).

The Bank has already affirmed the impact of this statute. (Bank's Response to Sum. Jud. Motion, Docket No. 33). In its response to Gaston's summary judgment motion, it said, "Mont. Code Ann. §71-3-542 sets forth fully and exclusively the bases upon which the priority of a construction lien as against non-construction liens is determined." (Id., p. 6). "If the Gaston lien is determined to have attached before the Bank's mortgage was recorded, it has priority. If the loan secured by the Bank's mortgage is determined to have been 'made for the purpose of paying for the particular real estate improvement being liened' then the Gaston lien has priority." (Id., emphasis added).

The Bank maintained this argument until Gaston unwittingly found invoices and checks, from a third-party, that proved the Bank was paying for Gaston's work on the Project. Gaston filed a Motion for Sanctions against the Bank for failing to produce the documents in discovery. (Motion for Sanctions, Docket No. 71) The parties resolved the motion by allowing Gaston a Supplemental Summary Judgment Brief, attaching the documents. (Order on Joint Request to Resolve Motion for Sanctions, Docket No. 95). The Bank thereafter shifted the focus of its defense, claiming that its Mortgage has priority, even though it paid for construction expenses, because one of the advances under the Mortgage paid for land.

This Court affirmed the authority of Section 71-3-542(4) in its recent holding of Signal Perfection, LTD., *et. al.,* v. Rocky Mountain Bank – Billings, 2009 MT 365, 353 Mont. 237, 224 P.3d 604. This Court affirmed a summary judgment ruling that held that various construction liens were prior to a bank's trust indenture. In the bank's opening brief it framed the appeal issue as "whether an interest, lien, mortgage, or encumbrance on real property loses priority over subsequently attached construction liens, pursuant to Mont. Code Ann. §71-3-542(4), even though *a substantial portion of the loan* secured by such interest, lien, mortgage, or encumbrance was not 'made for the purpose of paying for the particular real estate

improvement being liened.'" (Appellant's Brief in S. Ct. Case No. 09-0211, attached as Exh. B to Notice of Recent S. Ct. Opinion, Docket No. 114 (emphasis added)).

The facts of Signal are similar to this case. The bank had one encumbrance that secured advances to pay off a land purchase *and* to pay for the particular real estate improvement being liened on that land. (Id., Statement of Facts, p. 2). The bank, like the Bank here, argued the whole trust indenture should have priority over construction lien amounts for labor and materials provided after the debtor exhausted its bank loan.

This Court rejected this argument. Under the "plain meaning of the language" of Section 71-3-542(4), if **any portion** of an encumbrance secures financing for construction costs, a related construction lien has priority over the encumbrance. (Signal, 2009 MT 365 at ¶¶16-17). Section 71-3-542 "provides this state's method for determining priority between construction liens and other encumbrances on property." (Id., ¶15). It does not "discuss or provide any means of partitioning encumbrances or construction liens and then assigning priority among resultant parts." (Id.) The "plain," "clear and unambiguous" language of the statute requires the Court to "consider each party's encumbrance – [the bank's] trust indenture and each contractor's construction lien – *as a whole*." (Id., ¶¶16-17, emphasis added). "[W]e

reject as unsupported by the language of the statute, that §71-3-542 MCA allows courts to parse encumbrances and then assign priority among the constituent parts." (Id., ¶20).

In Signal, it was undisputed that the bank's encumbrance was used for the "nonexclusive purpose of securing advances for the construction" project and it was undisputed that "the construction liens at issue attached to the [property] for which the contractors provided services and materials." (Id., ¶18). Therefore, the "plain reading" of Section 71-3-542(4), MCA means "the construction liens, in their entirety, have priority over the entirety of the trust indenture." (Id.)

Under Signal and the plain reading of Section 71-3-542(4) Gaston's Construction Lien also has priority over the Mortgage. It is undisputed that the Mortgage's "nonexclusive purpose" was to secure advances to pay for the construction expenses. There is no dispute the Construction Lien attached to the Property for which Gaston provided services and materials. (Bank's Response to Gaston's Motion for Sum. Judg., p. 3-4, Docket No. 33 and see Stip. Judg., ¶¶1 and 4, Docket No. 45). The Construction Lien in its "entirety" has "priority over the entirety" of the Mortgage. The SJ Order was in error to hold otherwise.

Contrary to Signal and the plain language of Section 71-3-542(4), the district court partitioned out the advances under the Mortgage and assigned the Mortgage priority based on one advance. The court based its SJ Order on treating xvarious advances under the Mortgage as separate loans. The court held that Section 71-3-542(4) did not apply because "the first Loan funded Oakwood's purchase of the real property." (SJ Order p. 5, Docket No. 131). "The Mortgage, *to the extent it secures the First Loan*, is a purchase money mortgage. And *to that extent*, it has priority over [the] Construction Lien." (Order Denying Rule 59(g) Motion, p. 2, Docket No. 160). The court did not consider the Mortgage as a whole. It ignored that the Mortgage was not exclusively used to buy land. It ignored the portion of the Mortgage that was used for the "nonexclusive purpose" of paying for Project construction. Under Signal, the district court erred.[2]

[2] The Signal holding came out after Gaston's summary judgment briefing was complete. Gaston notified the district court of the opinion's relevance. (Notice of S. Ct. Opinion, Docket No. 114). In its SJ Order the district court dealt with the entirety of Signal by saying it "reviewed" the case, but "agrees with the Bank and finds that *Signal Point* [sic] does not support the legal positions advanced by Gaston." (SJ Order, p. 10, Docket No. 131).

4. The district court erroneously ignored the fact that under Section 71-3-542(4), the date Gaston's Construction Lien actually attached is irrelevant.

The court erred when it held the Construction Lien is junior to the Mortgage because it attached after the Mortgage was recorded. Under Mont. Code Ann. §71-3-542(4), even if the Construction Lien attached after the Mortgage was recorded, it still has priority. Montana's method for ruling on priority disputes between construction liens and other encumbrances on property is Section 71-3-542, MCA. (Signal, 2009 MT 365, ¶15). The Mortgage is an "encumbrance" in a priority dispute with the Construction Lien so, until the Legislature or this Court provides otherwise, Section 71-3-542 governs. Under that statute, a "construction lien" has priority over any other "interest, lien, mortgage, or encumbrance" that is filed before the construction lien attaches. (Mont. Code Ann. §71-3-542(4)). Gaston argues below that the district court erred in concluding that the Construction Lien attached after the Mortgage was recorded. But, even if Gaston loses that point, whether the Construction Lien attached first (giving it first-in-time priority) or attached after (gaining priority under Section 71-3-542), the attachment date is irrelevant.

B. The Construction Lien also has priority because it attached to the Property before the Mortgage did.

1. The Construction Lien's attachment date relates back to the date Gaston commenced work on the Property, over 3 months before the Bank recorded its Mortgage.

On June 12, 2006, Gaston dug tests pits across the Property for the groundwater tests Oakwood did before it closed the sale. The Bank offered no evidence to dispute Gaston's visible change to the physical condition of the Property on this date. Oakwood – the only other party in this litigation that could – confirmed Gaston's work commenced on June 12, 2006. (Stip. Jud., p. 1, Docket No. 45). The court held it was an "undisputed fact" that Gaston's work began June 12, 2006 – 3 months before the Mortgage was recorded. (SJ Order, p. 2, Docket No. 131). Under Mont. Code Ann. §71-3-535(5), the Construction Lien attached to the Property on June 12, 2006.

The court erroneously ruled that Gaston's work on June 12, 2006 could not be the attachment date because "Oakwood could not be 'contracting owner' until it acquired the subject real property." (Id., p. 7). Oakwood bought the Property September 20, 2006.

The district court disregarded that the Bank had already admitted that Oakwood "is the contracting owner, as that term is defined by statute, for the real estate improvement project." (Amended Answer, ¶2, Docket No. 16, admitting ¶3 of Complaint, Docket No. 1). Under Montana law the Bank is

bound by its admission. Audit Services, Inc. v. Frontier-West, Inc., (1992) 252 Mont. 142, 148-149, 827 P.2d 1242, 1247, and Grimsley v. Estate of Spencer, (1983), 206 Mont. 184, 199, 670 P.2d 85, 93 ("That a party is bound by his pleadings needs no further elucidation.") The court should not allow the Bank to defeat Gaston's motion by controverting an earlier admission.

The court also ignored that it was legally necessary for Oakwood to take title to the Property before the Mortgage could be recorded against it. Thus, even if Gaston's lien did not arise until Oakwood "acquired the subject real property," Oakwood's acquisition happened before the Mortgage was recorded. The Construction Lien, extending to Oakwood's interest immediately on the transfer of the deed, would have priority over the later-recorded Mortgage.

The district court also disregarded Montana law that defines the "contracting owner" as of the date the *construction lien is filed – not the date work begins.* Swain v. Battershell, 1999 MT 101, ¶¶25 & 27, 294 Mont. 282, 983 P.2d 873. And, Mont. Code Ann. §71-3-525(1) extends a lien to the owner's interest as it exists "at the commencement of work or is subsequently acquired in the real estate."

The Bank knew from the outset that Gaston's work was done *before* Oakwood took title to the Property. The buy-sell agreement with the Trust was in the Bank's records. (Bank's Reply to Suppl. Brief in Support of Sum. Jud., Exh. A, Docket No. 98). That agreement shows Gaston's work was the primary reason the deal worked for the buyer, seller, and Bank. Gaston dug test pits and performed monitoring tests, which gave Oakwood satisfaction enough to buy the Property, thus needing the Bank's funds. (Id.) Under the agreement, the Trust would "assume" the costs and results of Gaston's tests, "including engineering fees" if the sale fell through (Id., lines 135-137). Therefore, the Property's ultimate owner – whether Oakwood or the Trust – would be responsible for the engineering costs.

Under the Construction Lien Statutes, if Gaston's work was not paid, it could claim a Construction Lien. (Mont. Code Ann. §71-3-523). So, Gaston had a right to claim a lien if Gaston was not fully paid for the due diligence work. The Construction Lien would not be claimed against Oakwood or the Trust personally – it would be filed against the Property. A lien is an interest in "real estate," not a person. (Mont. Code Ann. §71-3-522(2)). Gaston's right to claim a Construction Lien against the Property – regardless of who owned it – arose the moment it first peppered the Property with holes for monitoring wells on June 12, 2006. When Oakwood bought

the Property it took the Property with Gaston's lien rights. (Mont. Code Ann. §71-3-535(5)). When the Bank recorded its Mortgage on September 20, 2006, Gaston's lien rights already existed. The Bank knew about the work and could have insisted on lien waivers.

The district court adopted the Bank's flawed argument that Gaston should have created a lien by agreement under Mont. Code Ann. §71-3-105 if it wanted a lien before Oakwood took title to the Property. (SJ Order, p. 8, Docket No. 131). This misreading of Section 71-3-105 confuses the distinction between the *creation* of a lien and its *attachment*. Section 71-3-105 does not apply to Gaston's Construction Lien because Oakwood was the titled owner of the Property when the Construction Lien was *created* through filing. Creation as a legal concept deals with the date the lien is filed against the Property. Attachment is a different legal concept. It concerns a date certain for resolving priority disputes between or among secured parties. If Oakwood did not have title to the Property when Gaston wanted to *create* the lien through recording, it would invoke Section 71-3-105. That is not the case. There is no dispute that Oakwood was the titled owner when Gaston

recorded its lien. Section 71-3-105 says nothing about whether Oakwood should own title to the Property on the date used to determine attachment.[3]

2. The district court erred in ruling the Bank's Mortgage had priority as a PMM. The Mortgage is not a PMM and the Legislature has not given a PMM absolute priority over a construction lien recorded on the Property.

a. There is no such thing as a "purchase money *loan*". Because the Bank loaned Oakwood money to pay for the construction expenses of the real estate improvement project, it cannot be a "purchase money *mortgage*."

Montana law defines a PMM as a *mortgage* "given for the price of real property at the time of its conveyance." (Mont. Code Ann. §71-3-114). This statute does not create a purchase money *payment* or *loan*. The Bank's single Mortgage secures payments for more than the price of real property. It secures payments for construction costs made before and after the Property's conveyance. The Mortgage is not a PMM.

The Bank's own files show that development costs were an original part of the deal with Oakwood. (Suppl. Brief in Support of Sum. Jud., Exh. C, Docket No. 97). The Bank's recorded a Mortgage for almost $2M more than the land's price. It relied on a Property appraisal before it modified its

[3] Even if Section 71-3-105 applied, by the terms of this Section the Construction Lien would attach as of the date Oakwood acquired an interest in the Property, which would have necessarily pre-dated the Mortgage's recording anyway.

Mortgage that calculated the Property's value "subject to completion." These actions show the Bank intended to be involved in funding the subdivision Project. (Brief in Support of Sum. Jud., Exh. J, Docket No. 25).

Before it recorded its Mortgage, the Bank promised to loan Oakwood money *for the purpose of the construction expenses of the development project*. (Suppl. Brief in Support of Sum. Jud., Exh. C, Docket No. 97). Documents provided by Oakwood prove this. (See, exhibits attached to Aff. of K. Taylor, Exh. C to Rule 59(g) Brief, Docket No. 155). Before Oakwood borrowed money the Bank knew it would need money to obtain preliminary plat and develop the Property. (Aff. of K. Taylor, ¶¶3 & 4, Exh. C, Docket No. 155). The Bank agreed to extend additional funds needed to obtain preliminary plat. (Id.) The Bank chose to lump all of its payments to Oakwood under one Mortgage, which would be recorded for $6M to cover construction expenses. (Id.) The Bank promised to "partner" with Oakwood on the Project. (Id., ¶5). Mr. Kelly's notes confirm this conversation occurred before the Bank recorded the Mortgage. (Id., ¶6).

Expert Banker Ron Farmer reviewed the Bank's loan file. He concluded it does not support a characterization of the Mortgage as a PMM. (Gaston's Expert Discl., Docket No. 32; and Aff. of R. Farmer, attached as

Exh. D to Rule 59(g) Brief, Docket No. 155). The Bank did not name an expert to rebut Mr. Farmer's conclusions.

The Bank's loan file shows the Mortgage could not be satisfied without the sale of lots developed by the Project. The represented value of each of the 18 Creekwood subdivision lots ($150,000), which the Bank noted would be used to pay down the Mortgage, would yield only $2.7M even if 100% of them were sold. (Suppl. Brief in Support of Sum. Jud., Exh. C, p. YOBank01564, Docket No. 97). This is insufficient to satisfy the loan, especially when the per diem interest was $900.00. (Brief in Support of Sum. Jud., Exh. I, Docket No. 25). The Bank's repayment method proves it did not expect this land to sit as raw ground.

b. There is no legal authority giving a PMM priority over a construction lien.

Even if the Mortgage could be construed as a PMM, Montana's Construction Lien Statutes give the Construction Lien priority over ***any mortgage*** that was recorded after the lien attached. Mont. Code Ann. §71-3-542(1). The Construction Lien has priority over ***any mortgage*** that attached first but was taken to secure advances made for the purpose of paying for the particular improvement being liened. Mont. Code Ann. §71-3-542(4). Unlike other jurisdictions, our Legislature has not made an exception in these statutes for a PMM.

Gaston's Notice of Supplemental Authority filed after the summary judgment hearing, citing statutes and case law from other jurisdictions giving a construction lien priority over a PMM. (Docket Nos. 60 and 67). Two Michigan cases interpreted a statute, like Montana's, that gives a construction lien priority over "any other" mortgage filed after the lien attached. See, Skotak v. Vic Tanny Int'l, Inc., 203 Mich. App. 616, 619, 513 N.W.2d 428 (Mich. 1994), cited in Adams Poured Walls, Inc. v. Raymer, 2006 WL 3303102 (Mich.App. 2006); and see, MCL 570.1119(4). The Adams court relied on Skotak's analysis of the terms "all other interests, liens, or encumbrances" found in Michigan's Construction Lien Act. These terms are nearly identical to the terms "any other interest, lien, or encumbrance" from Montana's Construction Lien Statutes. The Michigan court held that "there is no broader classification than the word 'all,' which, given its ordinary and natural meaning, leaves no room for exceptions . . . Thus, given the plain and unambiguous language of the statue, any mortgage, including a purchase-money mortgage, is subordinate to a construction lien if the mortgage is recorded after the first actual physical improvement has been made to the property." (Id.)

There is a statute, found in the "general provisions" outside of the Construction Lien Statutes, that gives a PMM priority over other liens, but

that priority is not absolute. A PMM's priority is conditioned on other provisions of law ("***except as otherwise provided by law***"). Mont. Code Ann. §71-3-114. This Section discusses liens in general, not specifically construction liens. The Legislature makes clear that statutes of *specific* import control statutes of *general* import. "When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it." Mont. Code Ann. §1-2-102. The Construction Lien Statutes specifically deal with construction liens' priority over ***any other mortgage***.

The district court erred by basing its *sua sponte* ruling on Mont. Code Ann. §71-3-114. When the court said Mont. Code Ann. §71-3-542(4) does not apply because *one advance* under the Mortgage paid for land, it read an exception into the statute that does not exist. The statute does not say a construction lien has priority over any mortgage *except one that secures several advances that include an advance to buy land.* The "office of the judge is to simply ascertain and declare what is in terms or substance contained [in a statute], not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. §1-2-101; and Signal at ¶16. When the language is "clear and unambiguous, the statute speaks for itself and [the Court] will not resort to other means of interpretation." Signal at ¶16. This

Court presumes the Legislature would not pass meaningless legislation. Chain v. Montana Dept. of Motor Vehicles, 2001 MT 224, ¶15, 306 Mont. 491, 36 P.3d 358.

Indeed the Legislature confirmed Part 1 of Title 71 (from whence comes the statute the district court relied on) does not have the final word on priority disputes with a construction lien. "Any lien entitled to actual priority over the lien of mortgage by force of ***any express provision*** of the laws of this state shall continue to have priority to the extent prescribed by law." Mont. Code Ann. §71-1-205 (emphasis added).

3. In the only Montana cases involving similar priority disputes to this case, this Court gave priority to the party least able to protect its interests.

In the limited cases involving a priority dispute between a construction lien and purchase money interest, this Court gave priority to the lien holder when the lender knew or had reason to believe, when making the loan, that the borrower would incur additional obligations to improve the property. (See, Home Interiors, Inc. v. Hendrickson, (1984) 214 Mont. 194, 692 P.2d 1229; American Fed. Sav. and Loan Ass'n v. Schenk, (1990) 241 Mont. 177, 785 P.2d 1024, Beck v. Hanson, (1979), 180 Mont. 82, 589 P.2d 141, and Tri County Plumbing & Heating, Inc., v. Levee Restorations, Inc., (1986), 221 Mont. 403, 720 P.2d 247). In those cases, priority was

determined based on who was in the better position to protect itself. When a lender could protect its interest by withholding funds equal to the improvements' value or requiring lien waivers before loaning funds, it was junior to the liens. (Id.)

The district court found these cases "unpersuasive for the reasons stated by the Bank." (SJ Order, p. 9, Docket No. 131). The Bank argued these cases did not apply because they were decided based on law pre-dating the 1987 Construction Lien Statutes. The Bank's logic was flawed, and the court's reliance on it was error.

First, the district court denied Gaston summary judgment *because* it defined the Mortgage as a PMM under Mont. Code Ann. §71-3-114. That statute is the same now as it was before the 1987 amendments. In cases cited above, this Court interpreted the exact same Section 71-3-114 before the district court, and held that the construction liens had priority.

Second, this Court held that "the result" of giving priority over other prior recorded liens to the party with the "least ability to protect its financial interests" is "consistent" with Section 71-3-542. Schenk, 241 Mont. at 181, 785 P.2d at 1027. The Court's holding affirmed the principles of the pre-1987 cases after the adoption of the Construction Lien Statutes.

This Court, even though not applying Schenk to the bank's cause in

Signal, affirmed Schenk's authority after the Construction Lien Statutes' adoption. (Signal, 2009 MT 365, ¶20). This Court confirmed that the policy behind Section 71-3-542(4) is a good one. "At the time it made the loan, [the Bank] had the opportunity to protect itself by either not making the loan or by conditioning it on Blackhawk's obtaining lien waivers from the contractors." (Id.)

The district court erred by ignoring the principles of these cases. Gaston's work created value for the Bank's secured position. The Buy-Sell Agreement proves Oakwood would not have purchased the Property, thus borrowing Bank funds, had Gaston not done its work. The Bank's records show it knew before the loan closed that construction work was being done on the Property. The Bank could have protected itself by not making the loan or conditioning it on lien waivers from Gaston. Gaston had no such power.

Montana is right to say that lenders must ensure the laborers who create value in the collateral get paid first. Otherwise, lenders could reap the unfair result of foreclosing on property that includes the benefit of a laborer's work without having to pay for it. The Bank was in a stronger position to protect itself. Under Schenk the Mortgage is junior.

C. The court's *sua sponte* summary judgment ruling was in error because it resolved disputed factual issues.

A district court may not make factual findings or resolve factual disputes at the summary judgment stage. Dovey v. BNSF Ry. Co., 2008 MT 350, ¶20, 346 Mont. 305, 195 P.3d 1223. This is especially true when the ruling is *sua sponte.* Under Mont. R. Civ. Pro. 56(c), summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The record must show the "complete absence" of any genuine issues of material fact in the Bank's case. Bonilla v. University of MT, 2005 MT 183, 328 Mont. 41, 116 P.3d 823.

"Because summary judgment is an extreme remedy which should not be a substitute for a trial on the merits if a material factual controversy exists, all reasonable inferences which can be drawn from the evidence presented should be drawn in favor of the non-moving party." Jobe v. City of Polson, 2004 MT 183, ¶10, 322 Mont. 157, 94 P.3d 743.

Because the district court granted the Bank summary judgment, the "strict standard" that applies to the "movant" applies to the Bank. Harland v. Anderson, (1976) 169 Mont. 447, 450, 548 P.2d 613, 615 (citations omitted; overruled on other grounds). The Bank's burden was to exclude

any real doubt as to the existence of any genuine issue of material fact. (Id.) The district court should have "indulged [Gaston] to the extent of all inferences which may be reasonably drawn" in its favor. (Id.) This Court should evaluate the summary judgment ruling in the light most favorable to Gaston, drawing all reasonable inferences from the arguments in Gaston's favor. (Mont. R. Civ. Pro. 56).

Summary judgment motions are not favored, and if doubt as to propriety of motion exists, it should be denied. Jarvenpaa v. Glacier Elec. Co-op, Inc., (1995), 271 Mont. 477, 480, 898 P.2d 690, 692. This is especially true when the ruling is *sua sponte*. "Generally, no formal cross motion is necessary for a court to enter summary judgment in favor of the nonmoving party. However, it is critical that the court ensure the original movant had 'full and fair opportunity to meet the proposition, that there is no genuine issue of material fact and the [nonmoving] party is entitled to judgement [sic] as a matter of law." In re Estate of Marson, 2005 MT 222, ¶9, 328 Mont. 348, 120 P.3d 382 (citations omitted). "The court, therefore, must afford the original movant with notice and an opportunity to be heard when it determines whether the case warrants judgment in favor of the nonmoving party." (Id.) "Further, the parties should be given an opportunity to present facts concerning the grounds upon which the district

court granted summary judgment." (Id.)

The district court acknowledged that the only pending summary judgment motion was Gaston's. It then granted summary judgment to the Bank anyway. (SJ Order, pp. 1 and 10, Docket No. 131). The Order lists the "material and undisputed" facts on which the decision was based. (Id., pp. 2-3). Absent from this list is the "material or undisputed fact" that the Mortgage is a PMM. The court's conclusion that the Mortgage was, in fact, a PMM, was the central factor in its ruling against Gaston. (Id., pp. 6-7). This move overstepped its authority. Gaston had raised factual issues relevant to summary judgment for the Bank but was denied a chance to present the facts concerning the conclusion about the Mortgage's character.

From the outset, Gaston disputed whether the Mortgage was, in fact, a PMM. Gaston, as the only party to file a summary judgment motion by the date ordered by the district court, stated in its opening brief:

> If this matter were to proceed to trial, Gaston would dispute that the Bank's mortgage is a purchase money mortgage based on evidence obtained in discovery. But, these arguments will involve factual issues that Gaston sets aside for the purpose of summary judgment. Showing that the Bank's Mortgage is not a purchase money mortgage is not crucial for Gaston to win summary judgment because the law protecting Construction Lien claimants is in Gaston's favor and regardless of the status of the Bank's Mortgage, the Construction Lien has priority.

(Brief in Sup. of Sum. Jud., FN1, Docket No. 25).

At the September 25, 2008 hearing on Gaston's motion, the Bank made a passing comment that the court could grant it summary judgment *sua sponte*. In response, Gaston's counsel began presenting evidence that disputed the Bank's claim to a PMM.

The Bank claimed its money could not have been intended to do anything but buy land because the Bank did not know Gaston was working on the Property. Gaston pointed out that the evidence proved the Bank knew about Gaston's work (i.e. it had taken steps to protect its decision to pay for project expenses such as using "$6 million mortgage to cover a $4.5 piece of raw ground.") (Id., p. 57, lines 7-11 & 16-21). The Buy-Sell Agreement, in the Bank's possession, also confirmed the Bank knew work was done on the Property because the sale was contingent on the results of that work. (Bank's Reply to Suppl. Brief in Support of Sum. Jud., Exh. A, Line 123-124, Docket No. 98). Evidence that the Bank knew what was being done on the Property bears on the facts of the Mortgage's creation.

The district court seemed to agree with Gaston, saying a trial would have to be held "about how [sic] knew what, when and how that would affect the attachment." (Transcript of SJ Hearing, p. 58, line 25 to p. 59, lines 2-3). Gaston's counsel had begun to offer evidence that the Mortgage was never intended just to buy land, saying "basically what the Bank did is

the Bank said, we will offer you up to $6 million . . . . " (Id., p. 58, lines 17-19). The district court interrupted Gaston's counsel and said **"if we get into that, I mean that's what the trial's for, correct?"** (Id., p. 58, lines 24-25). Gaston's counsel agreed. (Id., p. 59, line 1). The district court concluded that the "point of [Gaston's] motion" is "all that aside – as a matter of law, based upon certain undisputed facts, you're entitled – Gaston Engineering is entitled to summary judgment, that its lien has priority over **any** mortgage filed by the Bank, correct." (Id., p. 59, lines 5-11). Gaston's counsel made an offer of proof to the district court: "And the reason why I wanted to go into this, just briefly, *and I can suspend with it*, is because if Mr. Wagner is making the argument that they're entitled to summary judgment within my summary judgment motion, **there's a fact issue as to whether they have a purchase money mortgage.**" (Id., p. 59, lines 14-20). The district court responded, **"I understand.**" (Id., p. 59, line 21).

Based on the district court's comments, Gaston stopped presenting factual evidence to prove the Mortgage was not a PMM. Gaston proceeded in the case believing that the issue before the court was whether Gaston would win summary judgment on the legal issues. Gaston had no notice and no opportunity to address that district court's *sua sponte* resolution of the factual issues against Gaston. Marson, 2005 MT 222 at ¶9. The Court can

fault a district court for failing to rule correctly on an issue it had the opportunity to consider. State v. Johnson, 2005 MT 318, ¶13, 329 Mont. 497, 125 P.3d 1096.

The September 2008 hearing was not the only time Gaston raised the issue of whether the Bank's Mortgage was, in fact, a PMM. In its Rule 59 Motion, Gaston provided the court a 7-page listing of the pleadings and discovery in which Gaston raised the factual issue of whether the Bank's Mortgage is a PMM. (Rule 59(g) Brief, Exh. B, Docket No. 155). Gaston never had the chance to offer these facts to the court because it stopped Gaston from doing so at the summary judgment hearing.

Gaston offered factual evidence to the court when Gaston asked the court to amend the SJ Order. (Rule 59(g) Brief, Docket No. 155). Gaston proposes here that the factual issue of the Bank's intent or agreement on whether the Mortgage would cover payments for the Project, not just buy land, does not need to be answered here because Gaston is entitled to priority under Mont. Code Ann. §71-3-542(4). But, even if the factual issues were relevant to the outcome, the Bank's loan file, Mortgage's terms, and communications between Oakwood and the Bank all prove the parties intended this Mortgage to pay for a subdivision project. (Suppl. Brief in Support of Sum. Jud. and Suppl. Reply Brief in Support of Sum. Jud.,

Docket Nos. 97 and 101).

Bank president, Jay Harris, also raised a fact dispute over the Bank's intentions in recording the Mortgage (which is relevant to the what kind of Mortgage is at issue). He said it was "intended only for the purchase of the subject Property . . . [and the Bank] never agreed to finance the development of the property into the subdivision . . . ." (Aff. of J. Harris, ¶¶5 & 7, Docket No. 43 (underline in original)). Because Oakwood disputes this claim, a fact issue exists. (Rule 59(g) Brief, Exh. C, Docket No. 155).

The parties' intent is factually relevant to whether the Mortgage is a PMM. The parties' real intention at the time of making an agreement is a question of fact. In re Marriage of Mease, 2004 MT 59, ¶30, 320 Mont. 229, 92 P.3d 1148. "The extent and nature of the parties' consents . . . are questions of fact which must be first determined." Amerimont, Inc. v. Fidelity Nat. Title Ins. Co., 2009 MT 212, ¶¶15-16, 351 Mont. 292, 210 P.3d 691 ("on a motion for summary judgment, all reasonable inferences must be drawn in favor of the non-movant and the district court may not make factual findings or resolve factual disputes at the summary judgment stage.") The issue of intent of the parties to an agreement is one of fact that cannot be decided on summary judgment. Derrenger v. City of Billings, (1984), 213 Mont. 469, 475, 691 P.3d 1379, 1382.

The Mortgage is a contract that is examined under the rules of construction applicable to contracts. Weldon v. Montana Bank, (1994) 268 Mont. 88, 93, 885 P.2d 511, 514. Under Montana law, when a contract leaves room for multiple interpretation, the Court resorts to an examination of extrinsic evidence to understand its terms. Stockman Bank of Montana v. Potts, 2002 MT 178, ¶21, 311 Mont. 12, 52 P.3d 920. The extrinsic evidence includes the parties' intent in making the Mortgage, negotiations leading up to it, and both parties' actions in response to its terms.

In this case, the extrinsic factual evidence is relevant because the Mortgage itself never claims to be a "purchase money mortgage" and never states it was intended to be that kind of encumbrance. (Brief in Support of Sum. Jud., Exh. D, Docket No. 25). The Bank offered no document or testimony that uses those terms. It never claimed its Mortgage was a PMM in any documents of this case, until its lawyers used those terms in litigation.

The extrinsic evidence relevant to the Mortgage's creation was discussed in depth above. (See, Section B.2.a., above). That evidence proves the Mortgage is not and was never intended to be a PMM. The Bank disputes this fact. But, if the Mortgage's character as a PMM or non-PMM was relevant to the court's ruling, the court should have held a trial to hear all of the evidence. It did not. It resolved the issues itself, even after

conveying to Gaston that its counsel need not got into the evidence on that issue because "that is what a trial is for." The point of Gaston's summary judgment motion has always been – and still is in this appeal – whether the Bank's Mortgage is a PMM is irrelevant because the Construction Lien has priority under the Construction Lien Statutes. But, if the district court rejects that argument and rules that the Mortgage has priority *because* it was a PMM, Gaston should have had a chance to prove it was not a PMM.

Gaston's summary judgment motion is not an admission that there were no factual issues in dispute for purposes of summary judgment in the Bank's favor. Ike v. Jefferson Nat. Life Ins. Co., (1994) 267 Mont. 396, 399-400, 884 P.2d 471, 473-474 (citation omitted). When faced with cross-motions for summary judgment, a district court is not required to grant judgment as a matter of law for one side or the other. (Id.) It must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration. (Id.)

No Montana law creates the absurd requirement that Gaston must also, along with filing its summary judgment motion, file affidavits to create a fact issue just in case the district court decides to issue a *sua sponte* ruling for the Bank. The law presumes that if the court can grant summary

judgment *sua sponte*, all of the facts necessary for either party to obtain summary judgment have been completely resolved.

D. The district court should have granted Gaston's Rule 59(g) Motion to correct its error of resolving disputed factual issues.

In response to the SJ Order, Gaston filed a motion under Mont. R. Civ. Pro. 59(g), asking the court to amend its SJ Order by a) removing the part that granted the Bank *sua sponte* summary judgment, b) setting trial on the issue of whether the Mortgage was a PMM, and c) considering newly-discovered documents. (Rule 59(g) Brief, Docket No. 155). This Court reviews a district court's denial of a Rule 59(g) Motion for abuse of discretion. Lee v. USAA Casualty Ins. Co., 2001 MT 59, ¶27, 304 Mont. 356, 22 P.3d 631. "The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." (Id.)

This Court deems Rule 59(g) "an appropriate procedure under certain circumstances for seeking a complete reversal of summary judgment." (Id.) The criteria for determining what grounds or issues a party may or may not raise pursuant to a Rule 59(g) Motion include: (1) to correct manifest errors of law or fact upon which the judgment was based; (2) to raise newly discovered or previously unavailable evidence; (3) to prevent manifest injustice resulting from, among other things, serious misconduct of counsel;

or (4) to bring to the court's attention an intervening change in controlling law. (Id., ¶75 (citations omitted)).

A motion to alter or amend: (1) is not intended merely to re-litigate old matters nor are such motions intended to allow the parties to present the case under new theories; (2) should not present arguments which the court has already considered and rejected; (3) cannot be used to raise arguments which could, and should, have been made before judgment issued; and (4) is not intended to routinely give litigants a second bite at the apple, but to afford an opportunity for relief in extraordinary circumstances. (Id., ¶76).

The district abused its discretion in denying Gaston's Rule 59(g) Motion. The court ruled that it correctly applied the law to the undisputed facts to conclude that the Bank was "entitled to judgment as a matter of law." (Order Denying 59(g) Motion, p.3, Docket No. 160). It stated that Gaston was trying to "re-litigate old matters" and asking for "a second bite of the apple" by relitigating matters previously presented to the court. (Id., p. 2). According to the court's own words, the evidence presented at summary judgment showed the Mortgage was "clearly" a PMM. (Id.)

The district court is wrong. Gaston is not asking for a second bite of the apple. It wants its first bite. When Gaston tried to present factual evidence to show there was nothing clear about the Mortgage's

characterization as a PMM, the court shut it down at the summary judgment hearing. The court lead Gaston to believe it did not need to press the factual disputes because that is the purpose of a trial. **"[I]f we get into that, I mean that's what the trial's for, correct?"** (SJ Transcript, p. 58, lines 24-25). Gaston's offer of proof stated that "the reason why I wanted to go into this just briefly, *and I can suspend with it*, is because if Mr. Wagner is making the argument that they're entitled to summary judgment within my summary judgment motion, **there's a fact issue as to whether they have a purchase money mortgage.**" (Id., p. 59, lines 14-20). The district court responded, **"I understand.**" (Id., p. 59, line 21).

Had Gaston been on notice that the court would resolve the fact issues without taking factual evidence, it would have insisted the witnesses proceed and the evidence be presented. "The court, therefore, must afford the original movant with notice and an opportunity to be heard when it determines whether the case warrants judgment in favor of the nonmoving party." (Marson, 2005 MT 222 at ¶9). "[T]he parties should be given an opportunity to present facts concerning the grounds upon which the district court granted summary judgment." (Id.)

In support of its Rule 59(g) Motion Gaston offered affidavits from Messrs. Taylor and Farmer and Ms. Sironi that gave the district court

another chance to consider factual testimony relevant to the case. These affidavits, discussed in detail in Section B.2.a. above, provide the factual support to prove that the Mortgage was indeed created with the intent of securing payments for construction expenses of the Project. This information directly refutes the Bank's claim that the Mortgage was "intended only for the purchase of the subject Property . . . [and that] it never agreed to finance the development of the property into the subdivision . . . ." (Aff. of J. Harris, ¶¶5 & 7, Docket No. 43). The court ignored these affidavits. This Court can fault a district court for failing to rule correctly on an issue it had the opportunity to consider. Johnson, 2005 MT 318 at ¶13.

E. The district court should have granted Gaston's Rule 59(g) Motion to consider newly discovered evidence.

Gaston's Rule 59(g) Motion also produced documents Gaston only learned about the week of trial, days before the SJ Order was entered. The district court abused its discretion by not granting the Rule 59(g) Motion so it could consider this information and how it impacted the SJ Order.

After Gaston filed this lawsuit in 2007, the Bank filed another foreclosure action against Oakwood. (Gallatin County Cause No. DV-08-765C). The Bank's "other action" sought to foreclose its Mortgage on the Property and the other subdivision project on the Creekwood property. The Bank did not name Gaston in its other action even though it involves the

same Property, loan, Mortgage and parties (among others). When Gaston tried to join the other action and consolidate the two, the Bank was the only party of eight that vigorously opposed it. (Notice of Filing Motion to Intervene and Consolidate, Docket No. 78). Faced with an expensive defense of its request to intervene and consolidate, Gaston was forced to withdraw the request and proceed with this action. (Notice of Leave to Withdraw, Docket No. 79).

Days before the SJ Order, the Bank filed a Motion *in Limine* in this action to exclude evidence of its misconduct that was being raised by Oakwood in the other action. (Bank's Motion *in Limine* to Exclude Evidence of Alleged Bank Misconduct, Docket No. 116). The Bank referenced documents Gaston's counsel had never seen. (Gaston's Opp. to Motion *in Limine,* Docket No. 134). When the Bank refused Gaston's request for information about the documents, Gaston contacted Oakwood and received from it a copy of a November 9, 2009 letter to the Bank's counsel. (Aff. of K. Sironi, ¶4, attached as Exh. E to Rule 59(g) Motion, Docket No. 155). Attached were documents Gaston had never seen before. (Id., ¶5). The documents included a loan inquiry for a payment under the Mortgage, July 2007 invoices, and bank statements for accounts of Oakwood. (Id.) The documents were responsive to Gaston's discovery

requests, but the Bank never disclosed them. (Id., ¶7). These documents prove the Bank insisted some of the funds advanced under the Mortgage to pay for construction costs be reapplied to pay down interest on the money advanced under the Mortgage to buy the Property. (Id., ¶8). Oakwood was claiming in the other action that the Bank's insistence was wrongful. But, the information was relevant in this action to refute the Bank's claim to "two separate loans" – a claim the court relied on in ruling that "Clearly, the Mortgage, to the extent it secures the First Loan, it is a purchase money mortgage." (Order Denying Rule 59(g), Docket No. 160). The district court's decision to grant the Bank summary judgment was centrally based on the court parsing out the advances under the Mortgage and treating them as separate encumbrances. (SJ Order, pp.6-7, Docket No. 131).

These documents, discovered days before the SJ Order, prove the Bank treated all of the advances under the Mortgage as one advance. There may have been several payments, but the Bank treated them as one loan secured by one single Mortgage. This is relevant to the court's decision that the Mortgage is a PMM *based on* the character of *one* of the payments secured thereby.

The district court was unreasonable not to give Gaston a chance to present this new evidence in full. In this current real estate market, the

ruling that the Bank has priority over the Construction Lien effectively stops Gaston from getting paid for its work on behalf of Oakwood *and* the Bank. The court could have denied Gaston's summary judgment motion and still held trial on the factual issues. It could have corrected its earlier error by granting the Rule 59(g) Motion. Instead, it denied the motion and reiterated its SJ Order's findings. In so doing, the district court "acted arbitrarily without employment of conscientious judgment." It "exceeded the bounds of reason resulting in substantial injustice."

VII. CONCLUSION

Based on the foregoing, Gaston respectfully requests this Court to **reverse** the district court's SJ Order by granting summary judgment for Gaston that its Construction Lien has priority over the Bank's Mortgage. In the alternative, Gaston requests this Court **reverse** the district court's Order Denying Rule 59(g) Motion and remand the matter for trial on the disputed issues.

Dated: June ___, 2010.

_____
Kellie G. Sironi
Attorney for Gaston

CERTIFICATE OF SERVICE

The undersigned certifies that on June___, 2010 a true and accurate copy of the foregoing document was served by U.S. Mail, postage prepaid, on:

Dave Wagner
P.O. Box 10969
Bozeman, MT 59719-0969

Joby Sabol
225 E. Mendenhall
Bozeman, MT 59715

_____
Kellie G. Sironi

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief, pursuant to Mont. R. App. Pro. 11(4)(e) is proportionately spaced, 14 pt., and contains 9893 words.

_____
Kellie G. Sironi

APPENDIX

A. Order Re: Summary Judgment (November 25, 2009)

B. Order Denying Rule 59(g) Motion (February 5, 2010)